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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE,

Plaintiff and Respondent,

v.

JASON AARON CARTER,

Defendant and Appellant.

C087507

(Super. Ct. No. 15FE05921)

Defendant Jason Aaron Carter pled guilty to multiple crimes arising from a series of burglaries and robberies. He was sentenced to an aggregate prison term of 19 years four months, including a five-year enhancement for a prior serious felony conviction. On appeal, defendant contends remand is required to allow the trial court to exercise its discretion whether to strike the enhancement pursuant to recently enacted Senate Bill No. 1393 (2017-2018 Reg. Sess.; Stats. 2018, ch. 1013, §§ 1-2) (Senate Bill 1393). We remand the matter to permit the court to exercise its discretion under Senate Bill 1393. In all other respects, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Due to the limited nature of the claim on appeal, we need not recite the offenses in any detail. It suffices to say that defendant broke into a residential property and stole jewelry, attempted to rob a convenience store, assaulted an employee of the store, and assaulted a security guard who discovered him burglarizing a hospital room. Before taking the plea, the trial court noted that defendant planned to enter a “straight-up plea” of no contest or guilty in exchange for dismissal of two of the charged counts, and defendant would face a maximum exposure at sentencing of 26 years four months in prison. Defendant pled guilty to one count of first degree residential burglary (Pen. Code, § 459),¹ guilty to two counts and no contest to one count of attempted second degree robbery (§§ 664/211), and no contest to one count of second degree burglary (§ 459). Additionally, he admitted he suffered three prior convictions resulting in a prison term, one of which was a serious felony (§§ 667.5, subd. (b), 667, subd. (a)), and that he personally used a deadly and dangerous weapon in the commission of one count of attempted second degree robbery and the second degree burglary (§ 12022, subd. (b)(1)).

The trial court sentenced defendant to an aggregate prison term of 19 years four months, including a five-year enhancement for a prior serious felony conviction (§ 667, subd. (a)). Defendant timely appealed. The trial court denied defendant’s request for a certificate of probable cause.

DISCUSSION

Defendant contends his case must be remanded so the trial court can exercise its discretion whether to strike the prior felony conviction enhancement under section 667, subdivision (a), pursuant to Senate Bill 1393. We agree.

¹ Undesignated statutory references are to the Penal Code.

When defendant was sentenced, section 1385 did not authorize a trial court to strike or dismiss a section 667 prior serious felony conviction enhancement. (Former § 1385, subd. (b); Stats. 2014, ch. 137, § 1.) Senate Bill 1393 amended sections 667 and 1385, effective January 1, 2019, deleting the provisions in those statutes which prohibited a trial judge from striking a section 667 prior serious felony conviction enhancement in furtherance of justice. (Stats. 2018, ch. 1013, §§ 1-2.) “Senate Bill 1393 applies retroactively to all cases or judgments of conviction in which a five-year term was imposed at sentencing, based on a prior serious felony conviction, provided the judgment of conviction is not final” (*People v. Garcia* (2018) 28 Cal.App.5th 961, 971-972.)

Here, the trial court imposed a five-year enhancement pursuant to section 667, subdivision (a). Citing *In re Estrada* (1965) 63 Cal.2d 740, defendant argues Senate Bill 1393 applies to him retroactively because his judgment is not yet final. He contends remand is required because the record does not clearly indicate the trial court would not have dismissed the section 667 enhancement if it had the discretion to do so at the time of sentencing. The Attorney General concedes that *Estrada* requires retroactive application of Senate Bill 1393 to defendant’s case, but argues that because defendant pled to a stipulated sentence and did not obtain a certificate of probable cause, he may not challenge the validity of the plea. The People misconstrue the record. As defendant points out, he did not agree to a stipulated sentence but entered a “straight-up plea” with a maximum exposure of 26 years four months in prison. The trial court thus retained discretion in sentencing defendant.

Because the trial court retained discretion in sentencing defendant, his claim on appeal does not raise a challenge to the validity of the plea and he was not required to obtain a certificate of probable cause. “[A] plea in which the parties agree to a *maximum* sentence does not require a certificate of probable cause unless the defendant challenges the legal validity of the maximum sentence itself. [Citations.] This is because a plea bargain where the parties agree to any sentence at or below a maximum necessarily

contemplates that the trial court will choose from among a range of possible punishments.” (*People v. Galindo* (2019) 35 Cal.App.5th 658, 665.) Further, the record does not affirmatively suggest that the trial court would not exercise its discretion to strike the enhancement. Accordingly, because defendant was convicted and sentenced for a prior serious felony enhancement under section 667, subdivision (a), and his conviction is not yet final, remand is required to allow the trial court to exercise its discretion whether to strike the enhancement. (See *People v. Garcia, supra*, 28 Cal.App.5th at pp. 971-972 [applying Senate Bill 1393 retroactively under the *Estrada* rule to nonfinal judgment].)

DISPOSITION

The judgment is affirmed. The matter is remanded to the trial court for the limited purpose of allowing the trial court to exercise its discretion pursuant to sections 667, subdivision (a), and 1385, as amended by Senate Bill 1393, as to whether to strike the prior serious felony enhancement.

KRAUSE, J.

We concur:

BLEASE, Acting P. J.

ROBIE, J.